

**Michigan Department of Environmental Quality  
Land and Water Management Division**

**Wetland Program Question & Answer Document**

March 2009

*The following summary has been compiled in response to requests for information regarding Michigan's Wetland Program -- operated within the Department of Environmental Quality's (DEQ) Land and Water Management Division (LWMD) - and potential changes to this program currently under consideration.*

*Governor Jennifer M. Granholm's 2010 budget has proposed to eliminate funding for the Wetlands Program in light of the severe economic challenges facing the state. This proposal would relinquish responsibility for wetland management in Michigan to the federal government. For this proposal to be finalized, the Michigan Legislature would need to repeal Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA).*

*Should this proposal become finalized, applicants would be required to seek wetland permits from the United States Army Corps of Engineers (USACE) office in Detroit, who would make decisions on permit applications in consultation with the United States Environmental Protection Agency's (USEPA) Region 5 office in Chicago. Other portions of the Wetlands Program would also be eliminated.*

*The DEQ has received questions regarding many aspects of the state and federal Wetland Programs as this proposal is being evaluated. Questions have been organized into the following general categories:*

- Fundamentals of Michigan's state wetland permit program.
- Michigan's State Assumed 404 Program.
- The Federal 404 Permit Program as administered by the USACE in other states.
- Identification and mapping of wetlands.
- Summary of proposed changes to Michigan's Program.
- Other questions regarding wetland resources.

*In addition, links to general sources of information are provided at the end of this document.*

**Fundamentals of Michigan's State Wetland Program**

**Q1: When was Michigan's Wetland Permit Program initiated and with what legal basis?**

A1: The Goemaere-Anderson Wetland Protection Act, which was passed in 1979 under Governor William Milliken, provided for the "the preservation, management, protection, and use of wetlands." This law has since been codified as Part 303, Wetlands Protection, of the NREPA.

The Wetland Protection part defines what wetlands are regulated, and requires a permit for the

physical alteration of wetlands. Specific actions that are regulated include placement of fill, dredging, constructing, operating, or maintaining a use or development in a wetland, and draining surface water from a wetland.

Some activities are specifically exempt from permit requirements. Among these are hunting and fishing, boating, grazing of livestock, specified farming and forestry practices, and maintenance of existing structures as specified in the statute.

Part 303 and associated Administrative Rules are available at the following site:  
[www.michigan.gov/deqwetlands](http://www.michigan.gov/deqwetlands).

**Q2: What wetlands are regulated by Part 303?**

A2: Part 303 defines regulated wetlands as including all those that are contiguous to inland lakes or streams and the Great Lakes, as well as other wetlands over five (5) acres in size. Contiguous wetlands may be connected to lakes, streams, or the Great Lakes by a surface water connection, or by groundwater, and it is presumed that any wetland within 500 feet of inland waters or within 1000 feet of the Great Lakes has a groundwater connection. The DEQ may assert jurisdiction over non-contiguous wetlands less than five (5) acres in size under special circumstances if it notifies the property owner in advance.

Local units of government may also regulate non-contiguous wetlands that are less than five (5) acres in size. Special justification must be given by the local unit of government for regulation of non-contiguous wetlands less than two (2) acres in size.

**Q3: How does the permit application process work?**

A3: Landowners may submit permit applications to the DEQ's LWMD as part of a consolidated permit application program. Only a single application is needed for a construction project (e.g. single-family home, local or state road or highway, commercial or industrial site, mining operation, etc.) to obtain authorization under the following state authorities:

- Part 303 – Wetlands Protection
- Part 301 – Inland Lakes and Streams
- Part 323 – Shorelands Protection and Management
- Part 325 – Great Lakes Submerged Lands
- Part 31 – Floodplains
- Part 315 – Dam Safety

LWMD staff review the application to make sure that all necessary information has been provided. DEQ staff review project plans, and meet with the applicant as needed. A public notice may be issued, giving neighboring property owners, local units of government, and other agencies an opportunity to comment. However, minor projects may be processed without a public notice. When the permit is issued, it authorizes the activity under ALL of the applicable authorities.

**Q4: How does the state permit program coordinate with federal programs?**

A4: Michigan's Wetland Regulatory Program was designed to allow for administration of the federal Section 404 Permit Program. Most permits issued by the LWMD also provide the necessary authorization under Section 404 of the Clean Water Act. See Q 13 to 19 for a full description of this authority. A number of related federal authorizations are also provided, with the result that most wetland permits issued by the DEQ also provide the following:

- Authorization under Section 404 of the Clean Water Act.
- Water Quality Certification under Section 401 of the Clean Water Act (see Q17).
- Coastal Zone Consistency Review as needed.
- Screening under the federal Endangered Species Program and coordination with the United States Fish and Wildlife Service.
- Screening and coordination with the State Historic Preservation Program.

**Q5: What is Coastal Zone Certification?**

A5: Construction projects located within Michigan's coastal management boundary are subject to a Federal Consistency review by the DEQ as required by Section 307 of the Coastal Zone Management Act, PL 92-583, as amended. A determination of Federal Consistency with the Michigan Coastal Management Program requires evaluation of a project to determine if it will have an adverse impact on coastal land or water uses or coastal resources. This review is normally completed by the DEQ as part of the application review process.

**Q6: How many permit applications are submitted to the LWMD each year? How many are issued?**

A6: The LWMD receives approximately 1500 applications each year for permits to alter wetlands. Many of these applications are submitted under the LWMD combined permit process, and also seek approval under other state regulations for impacts to floodplains, inland lakes and streams, the Great Lakes, or impoundments (under the dam safety program).

Although permits are issued to approximately 90 percent of permit applicants, staff works with contractors and landowners to avoid and minimize impacts to sensitive wetlands and other water resources. On an annual basis, initially proposed wetland impacts are reduced by 50 to 75 percent during the review process. About 2 percent of the applications are denied, with the remainder either being withdrawn or not followed up on by the applicant.

**Q7: How many staff does the DEQ have in the Wetlands Program?**

A7: DEQ's LWMD staff work in multiple program areas (e.g. wetlands, inland lakes and streams, Great Lakes, floodplains, dam safety) making an exact count difficult. In general, 78 staff are involved in administration of the Wetland Program as a portion of their duties.

- Wetland Program Staff: Eight staff total. (Seven staff plus a supervisor in the Wetlands, Lakes and Streams Unit and one wetland restoration coordinator.) These staff are responsible for program coordination, education and outreach, and technical assistance to regulatory field staff.
- Permit Consolidation Unit: Seven staff total. This unit is responsible for initial review of permit applications, public noticing applications, and scheduling public hearings.
- Field Operations Section (includes Compliance & Enforcement Unit): 57 staff. These staff are located in 10 offices throughout the state and is responsible for technical review of applications, making final permit decisions, compliance and enforcement, and public outreach.
- Transportation Unit: Six staff who work specifically with state and local transportation agencies.

It has been estimated that 30 staff positions would be eliminated as a result of repeal of the state Wetlands Program. Remaining positions would continue to work in other LWMD permit programs.

It is estimated that the USACE has approximately 39 staff (including six field staff) in the Detroit District that process Great Lakes, Section 10 waters, and wetland permit applications for all of Michigan and part of Indiana. Please contact the USACE's Detroit District directly for additional information relative to their staff and responsibilities.

**Q8: What is the state's current budget for the Wetlands Program?**

A8: The wetlands program is currently funded with 2.1 million dollars from the general fund; 1.5 million dollars of permit fees and state restricted funding from MDOT, and about 400,000 dollars from federal funding. The federal funding is an average amount that the LWMD receives annually in competitive grant awards from the USEPA. These grants are for projects which involve wetland research, program improvement, and public education and can not be used for regulatory program implementation.

**Q9: How long does it take for the DEQ to process a wetland permit application?**

A9: By statute, the DEQ has an initial 30 day application period to assure that sufficient information has been provided by the applicant to review the permit (also known as a completeness review). As this initial time limit is paused when the DEQ is waiting for information from the applicant it is not counted in the average processing times listed.

The average time in 2008 for DEQ to process a **complete** wetland permit application was 9 days for files that are not public noticed (that is, for applications under General Permit categories) and 46 days for files that are public noticed. This average processing time is calculated based on the number of days from the end of the application period (when a permit is determined to be complete) to the date of the permit decision.

DEQ is required to make permit decisions within 90 days after an application is complete (120 days if there is a public hearing). The USACE has no deadlines for review. See Attachment 1 for a comparison of the DEQ and USACE permit decision time lines.

**Q10: What fees are charged for state permits?**

A10: Normal permit application fees are \$100 for a general permit; \$500 for most permits that require a public notice; and \$2000 for certain specified major permits that require engineering review. The fee for mowing along the shoreline of the Great Lakes within specified limits is \$50.

Fees are also charged for pre-application meetings which are held at the request of the applicant. No fee is charged for meetings with small landowners held in DEQ offices. Pre-application meeting fees, if charged, range from \$150 to \$1000, and are based on the scope of the project, and whether an on-site review is requested by the landowner.

**Q11: How does the DEQ respond to complaints about violations of state wetland regulations?**

A11: Each year the DEQ receives complaints regarding violations from citizens, local units of government, and other DEQ staff. Typically, about 25 percent of all complaints – when investigated – are not violations. (A permit may have been issued for the wetland alteration that is observed, or it may be exempt from regulation.)

The following list summarizes average annual responses to complaints regarding wetland violations over the past five years (2003 – 2008).

Average number of Part 303 complaints per year:	1524
Site inspections:	817
Violation notices issued	510
Resolved through voluntary restoration	200
Resolved through an After-the-Fact permit	116
Referred for elevated criminal action	12
Referred for elevated civil action	5
Resolved through Administrative Settlement Agreement	5
Referred to the USACE	2

It should be noted that as a statewide policy since 2008, LWMD staff have not been responding to low priority complaints due to current resource constraints.

**Q12: What is the DEQ doing to manage and protect wetlands in addition to the permit program?**

A12: DEQ staff engage in a number of projects to provide better information to the public regarding the location of wetlands, to evaluate the condition of wetlands, and to provide information to the public. Most of these projects are supported with federal grant funds and many include non-state government partners. Examples include:

- Wetland mapping;
- Coastal Wetland Protection, Management and Restoration;
- Development of scientific methods to monitor the condition of wetlands;
- Development of methods to control Phragmites (a highly invasive plant) on both public and private property;
- Participating in local planning projects to identify potential wetland protection and restoration projects; and,
- Education and outreach, including presentations to civic organizations, school groups, lake associations, watershed councils, local governments and other public groups.

These components of the Wetlands Program would be relinquished along with the permit program under the current budget proposal.

### **Michigan's State Assumed 404 Program**

**Q13: What is Section 404?**

A13: Section 404 of the Federal Clean Water Act outlines the federal permit program for dredge and fill activities in wetlands and other waters. It is administered jointly by the USACE and the USEPA. In most states, a permit is required from the USACE prior to alteration of federally regulated wetlands.

**Q14: How does Michigan administer the federal Section 404 Program?**

A14: If a state operates a permit program that is equivalent to Section 404, it may request approval from the USEPA to administer the 404 Program. Under a state authorized Section 404

Program, permits issued by the state also authorize construction activities under Section 404. That is, no separate permit is required from the USACE.

Michigan received authorization to administer the Section 404 Program in 1984. Since that time, permits issued under Part 303, Wetlands Protection, and Part 301, Inland Lakes and Streams, typically also carry 404 authority.

The state cannot assume 404 authority over waters that are essential to interstate commerce, including the Great Lakes and certain waters directly connected to the Great Lakes. In these areas, two permits are required for alteration of state waters – one from the DEQ and one from the USACE.

**Q15: How many Section 404 permits does the DEQ process each year?**

A15: Approximately 4000 to 6000 permit applications are processed by the DEQ's LWMD each year that authorize dredge and fill activities under Section 404 of the Clean Water Act. The majority of these permits are for impacts to inland lakes and streams. Approximately 1500 permits per year impact wetlands. Based on the current difficulty in making jurisdictional determinations at the federal level, estimating the percentage of these 1500 wetland permits that would fall under 404 authorization is not possible.

**Q16: What is the role of the federal agencies in Michigan's 404 Program?**

A16: The USEPA is responsible for oversight of Michigan's 404 Program. In this role, the USEPA directly reviews about 1 to 2 percent of the applications processed each year, including those for the projects with the largest impacts or those with potential impacts to especially sensitive natural resources, such as federal threatened or endangered species.

In addition, the DEQ's LWMD issues an annual report to the USEPA summarizing all other actions taken during the year.

The USACE may comment on public notices issued by the DEQ, but does not normally play any other direct role in Michigan's 404 Program. The USACE does retain jurisdiction over Great Lakes coastal waters as noted in Q14.

**Q17: What are the basic requirements for state administration of a Section 404 Program?**

A17: In order to operate a Section 404 Program, a state must have authority over all waters (including wetlands) that are protected under federal law. State laws must provide the authority to review permit applications in a manner that ensures consistency with federal standards; a state may be more stringent than federal standards but not be less so. A state may not exempt activities that are not exempted under federal law. The state must also be able to demonstrate the ability to carry out a compliance and enforcement program consistent with federal standards.

A state may not operate a "partial" program – that is, it cannot provide 404 permits for some waters and not others (e.g. over lakes and streams but not wetlands).

USEPA's regulations governing state-administered Section 404 Programs may be found at: <http://www.epa.gov/owow/wetlands/pdf/40cfrPart233.pdf>.

**Q18: What is Section 401 Water Quality Certification?**

A18: Essentially, Section 401 of the federal Clean Water Act requires any applicant for a federal permit to obtain certification from the state that the activity in question will not cause a violation of state water quality standards. This provision gives the state an opportunity to review actions taken by the federal government which may impact the state's natural resources. In many states, the 401 Water Quality Certification review provides the primary means under which the state evaluates impacts to wetlands.

In Michigan, because Section 404 wetland permits are issued by the DEQ, the review of impacts to state water quality is built into the process. No separate "401" or "Water Quality Certification" process is needed. In many other states, this is a separate process.

If Michigan's Wetland Program were eliminated, then persons who applied for wetland permits from the USACE would be required to obtain a Section 401 Water Quality Certification from the DEQ.

**Q19: How do other states participate in the federal program?**

A19: Only two states, Michigan and New Jersey, have been approved to administer the Section 404 Permit Program in accordance with Clean Water Act requirements. These two states administer the most streamlined regulatory programs in the nation.

Numerous other states make significant contributions to review of permit applications by the USACE. This may be through the Section 401 Water Quality Certification Process (see Q18) or through an agreement between the state in question and the USACE under which the state carries out a significant portion of the permit review process, which is then incorporated into the USACE permit. In either case, a separate federal permit is still required.

Information regarding other state programs is available through the Association of State Wetland Managers at the following Web site: <http://aswm.org/swp/statemainpage9.htm>

**The Federal 404 Permit Program as administered by the USACE in other states**

**Q20: What federal agency is in charge of permitting in most states?**

A20: The USACE. In Michigan, the USACE's Detroit District Office would be in charge of this program if it were not administered by the Michigan DEQ.

**Q21. What wetlands are regulated by the Michigan's permit program versus the federal permit program?**

A21: Wetlands are regulated by state law if they are contiguous to inland lakes or streams and the Great Lakes, as well as other wetlands over five (5) acres in size. Contiguous wetlands are connected or located within 500 feet of an inland lake or stream, or connected or located within 1,000 feet of one of the Great Lakes or Lake St. Clair. The DEQ may also assert jurisdiction over non-contiguous wetlands less than five (5) acres in size if protection of the area is essential to the preservation of the natural resources of the state and if it notifies the property owner in advance.

Because of recent court decisions, the jurisdictional scope of the federal wetland law is not clear and is decided on a case-by-case basis. Jurisdictional decisions by the USACE are largely made following a field guidance memo and an 85-page field Instructional Guidebook. The

USACE asserts jurisdiction over wetlands adjacent to traditional navigable waters and wetlands that directly abut non-navigable tributaries of traditional navigable waters that are relatively permanent. The USACE asserts jurisdiction over other wetlands based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable water.

It is anticipated that case-by-case jurisdictional determinations for the following categories of wetlands would be necessary and it is likely that the USACE would not protect all of these wetlands under the Clean Water Act.

- Isolated wetlands not physically connected to lakes or streams. This category includes 930,856 acres, or 17 percent of Michigan's wetlands.
- Wetlands adjacent to streams that are not relatively permanent. 36 percent of Michigan's streams are intermittent or ephemeral. No estimate exists of the acreage of wetlands that would be impacted.
- Wetlands that are adjacent to, but not directly abutting, relatively permanent streams. The USACE must determine whether wetlands are "abutting" or "adjacent to" a perennial stream based on an evaluation of site hydrology. No estimate of the acreage of wetlands impacted exists.
- Wetlands that are adjacent to isolated lakes and ponds. There are 26,384 isolated lakes and ponds in Michigan; wetlands adjacent to these water bodies would be regulated only if an interstate commerce connection were defined for the lake or pond.

Additional information on this question can be found in the DEQ's Briefing Paper on the Scope of Federal Jurisdiction under Section 404 of the Clean Water Act, found as Attachment 2.

**Q22: What is the difference between the federal permit program and the state permit program?**

A22: Because Michigan's program was intended to allow administration of the federal program, it is not surprising that they are similar in many ways. For example, the scientific definitions of wetlands under state and federal law are very similar, as are basic permit criteria, and permit exemptions.

The process of identifying and documenting the extent of federal regulation for any given application is now very complex. This is the result of multiple legal decisions in federal court. Many landowners must now obtain what is known as a "jurisdictional determination" prior to a permit application in order to find out where a permit is required. Unlike the state Wetland Identification Program (see Q29) which relies on the *scientific* identification of wetland boundaries, the federal Jurisdictional Determination also rests on a series of *legal tests*, and can be both complex and time consuming.

One of the other primary differences between the state and the federal process is that there is no deadline for permit processing under federal law. DEQ is required to make permit decisions within 90 days after an application is complete (120 days if there is a public hearing).

**Q23: How long does it take to obtain a permit from the USACE?**

A23: There is no mandatory time frame under federal law for the USACE to determine whether an application is complete or to make a permit decision. The USACE's Detroit District estimates that 58 percent of public notice files are processed within 120 days of receipt of a complete application and that 70 percent of non-public notice files are processed within 60 days of receipt of a complete application. Some permit applications, however, take 600 to 700 days for review.



It must be noted that the USACE frequently requires a Jurisdictional Determination for wetlands before they begin their review process. The current average time frame for Jurisdictional Determinations is 90 days.

**Q24: Does the USACE require wetland mitigation?**

A24: Yes. The USACE and the USEPA issued a new rule regarding mitigation on April 10, 2008. This rule requires mitigation for impacts authorized under all Section 404 Permits issued by the federal agencies, including those on inland lakes and streams. Applicants for federal permits may wish to review this rule, which is now part of the federal permit regulations at 40 CFR Section 230, subpart J. See the following Web site for additional information.

<http://www.epa.gov/wetlandsmitigation/#regs>

**Q25: How do the general permits issued by the USACE compare with those issued by the DEQ?**

A25: The DEQ has authorized 25 General Permit categories under Part 303 for activities that typically have minor impacts to the state's wetlands. Permits for these activities can be reviewed in an expedited manner, without a public notice, but are evaluated on a site-specific basis. If necessary, conditions that are relevant to a specific project are placed on the permit. The DEQ General Permit process relies on identification of minor projects through a simplified process, with brief descriptions of eligible projects.

The USACE operates a somewhat parallel General Permit system. However, this process is typically more complex than the DEQ General Permit process. The USACE has issued 50 Nationwide General Permits (NWP) that are, as the name implies, typically applicable to wetland ecosystems anywhere in the country. However, not all NWPs are available in every USACE District because the District Engineer has discretion to suspend or further condition each NWP.

The USACE NWPs differ from the DEQ General Permit Categories in that they typically include very detailed descriptions of regulated activities, and highly specific criteria and limitations. A set of 28 NWP General Conditions are also applicable to the USACE General Permits as specified. In most instances, the USACE requires an application, known as a "pre-discharge notification" (PDN) to authorize an activity under a NWP; the contents of the PDN are specified in General Condition #27. Mitigation is generally required for wetland impacts. When issued, the permit will also include additional site specific conditions.

The USACE may also issue General Permits through a Regional General Permit (RGP). These General Permits are structured in a manner that is similar to a NWP, but are specific to a particular USACE District. There is one RGP that impacts Michigan, and addresses minor work, structures, and discharges of dredged and fill materials.

The current USACE NWPs were published in the *Federal Register* on Monday, March 12, 2007, pages 11092-11198. These NWPs expire on March 18, 2012.

## **Mapping and Identification of Wetlands**

**Q26: How can landowners identify regulated wetlands on their property?**

A26: Numerous maps are available through state, federal, and local agencies to provide information regarding the location of wetlands. Most maps use similar sources of data, and are consistent in identification of wetland areas that can be identified at the scale of the map in use.

However, because of the scale of these maps and the methods used to produce them, they cannot be used to define the exact location and boundaries of wetlands on an individual parcel of land.

The DEQ county wetland inventory maps are a good starting point for the general location of wetlands. Electronic copies of these wetland inventory maps can be reviewed on-line in an interactive mapping system called the Wetland Map Viewer.

The federal agencies (USACE and USEPA) use National Wetland Inventory (NWI) Maps produced by the USFWS. The NWI maps are incorporated into the DEQ County Wetland Inventories. The DEQ is also in the process of working to update the NWI maps.

**Q27: What are the most common concerns regarding wetland identification?**

A27: In most instances, the general public recognizes the presence of common wetlands. Local building departments, health departments, and contractors regularly recognize wetlands and contact the DEQ to confirm permit requirements. However, it is more difficult to clearly delineate the boundary line between uplands and wetlands. On properties that contain a mix of upland and wetland, the identification of this boundary may require the assistance of a trained professional to assess the vegetation, hydrology, and soils of the site.

**Q28: How are wetland boundaries identified?**

A28: Wetland boundaries are identified using a scientific process that has been developed to meet the requirements of state and federal laws. The State of Michigan identifies wetlands using what is known as a “two parameter approach” that requires proper identification of vegetation and hydrology. Hydric soils (those that show properties of having been without oxygen and under the influence of water for an extended time) are evaluated as an indicator of wetland hydrology.

The USACE uses a very similar “three parameter approach” using vegetation, hydrology, and hydric soils to determine scientific wetland boundaries. However, federal Jurisdictional Determinations also require application of a series of complex *legal* tests.

**Q29: How can a landowner confirm the location of wetland boundaries under state law? How does this process work under the federal program?**

A29: DEQ staff regularly confirm wetland boundaries during the permit review process. However, landowners may also confirm wetland locations in advance (e.g. prior to purchasing property or planning a project, or to expedite the permit process). The DEQ has established a Wetland Identification Program to assist the public in identifying the location of wetland and non-wetland (i.e., upland) areas on their property. Requests for this service are voluntary, and a fee is required. For properties smaller than five acres, a landowner can request that the DEQ identify wetland boundaries, provide a report with a map, and provide a three year guarantee of the location of the wetlands. In cases where the property exceeds five acres, the landowner can hire a private wetland consultant to identify the wetland areas. Then, the landowner can request that the DEQ verify the consultant boundaries and provide a three year guarantee of the wetland boundaries.

The USACE does not have a wetland identification program and landowners must hire a private consultant for delineations and then request a Jurisdictional Determination from the USACE. The USACE has no mandated timeframe for review of Jurisdictional Determinations.

## **Summary of Proposed Changes to Michigan's Program**

### **Q30: What change has been proposed to Michigan's wetland program?**

A30: The Governor's 2010 budget recommendation proposes eliminating funding for Michigan's wetland program and the administration of the federal Section 404 Permit Program which would require repeal of Part 303, Wetlands Protection, by the State Legislature.

### **Q31: How would this action impact permits for activities in inland lakes and streams?**

A31: A federal Section 404 Permit is required for dredge and fill activities in inland lakes and streams, as well as wetlands. The DEQ's LWMD would continue to issue permits for these activities under Part 301, Inland Lakes and Streams, but these permits would no longer carry federal Section 404 authority. Therefore, landowners would be required to obtain two permits – a Section 404 Permit from the USACE and an Inland Lakes and Streams permit from the DEQ.

Approximately 3000 to 4000 projects each year would require a Section 404 permit from the USACE. Typical permitted projects include placement of bridges or culverts where roads or driveways cross streams; drain enclosures; dredging of lakes or streams; construction of seawalls or similar shoreline protection; placement of pilings; and placement of fish and wildlife habitat structures.

### **Q32: What would change for individuals, businesses, or agencies that need wetland permits?**

A32. Repeal of Part 303 and elimination of Michigan's Wetland Program will impact individuals, businesses, or agencies that need wetland permits in the following ways:

- Permit applicants will need to apply for wetland permits from the USACE's Detroit District, under the Clean Water Act, instead of from DEQ, under Part 303.
- Most permit applicants will need to obtain a formal case-by-case jurisdictional determination for wetlands prior to applying for a permit.
- Two permits will be needed for inland lakes and streams projects, one from the DEQ and one from the USACE.
- Applicants will need to get a 401 water quality certification from the DEQ as part of the federal permit process. The DEQ currently provides this certification as part of its wetland permit review.
- Applicants will need to get Coastal Zone consistency review from the DEQ as part of the federal permit process in coastal areas of the state. The DEQ currently provides this certification as part of its wetland permit review.
- The USACE has no statutory timeframe for review of permit applications. (See Q23 for more information on average permit processing timeframes.)
- DEQ prioritization of projects sponsored by the Michigan Department of Transportation (MDOT) and local road agencies in accordance with a Memorandum of Agreement will be eliminated.

- The services DEQ provides as part of their regulatory program, including the Wetland Identification Program and Pre-application Meetings, will be eliminated.
- County Drain Commissioners will need to review maintenance and improvement plans, and determine where separate Section 404 permits will be needed, allowing sufficient time for permit processing through the USACE.

**Q33: How would this change impact state policy makers?**

A33. Elimination of the state Wetland Program will result in a federal Wetland Permit Program operated without significant state input, support, or direction. Because the Section 404 Program is based in a pollution control law, state and local land use concerns, riparian property rights, and similar land use issues would be expected to have less influence on regulatory decision-making than under the state permit program, which blends water quality protection with natural resource management.

Seven of the other eight Great Lakes states contribute significantly to the review of wetland permit applications processed by the USACE using independent state wetland program authorities and Section 401 Water Quality Certification Programs. These states provide significant funding to support wetland protection, restoration, and management.

**Q34: What impact would this change be expected to have on Michigan's wetland resources?**

A34: The change is expected to have the following impacts to Michigan's wetland resources:

- It is likely that the USACE will regulate less wetlands than are regulated by DEQ. (See Q21.)
- State law clearly regulates draining and dredging of wetlands as well as fill. Because federal law regulates discharges of dredge or fill material, some activities may not be fully regulated.
- Because DEQ permit staff are located in multiple district offices, they have a stronger knowledge of local resources and are better positioned to complete necessary site inspections than the USACE, including identification of wetland boundaries and rare resources.

**Q35: How will the change impact local governments?**

A35: Beyond describing state responsibilities to protect wetlands, Part 303 authorizes local units of government to adopt local ordinances for that purpose. If Part 303 is completely repealed, local governments will be able to regulate wetlands under general land use authorities and local zoning provisions. However, the provisions of Part 303 that standardize local wetland regulations would no longer apply, with the result that wetland definitions and criteria could vary among local jurisdictions. On the other hand, proposed legislation that retains some of the provisions of Part 303 shifts a portion of the regulatory burden, including the burden of regulatory takings, to a local government that chooses to regulate wetlands.

If Part 303 is repealed, DEQ staff would no longer be available to provide assistance to local officials. Currently, DEQ staff in ten offices have significant local knowledge, and develop relationships with local communities as well as providing assistance to local officials.

**Q36: How may the public be impacted?**

A36: Unclear and less comprehensive regulation may lead to increased wetland losses and their benefits to society, which can:

- increase flood damage on private land
- impact community groundwater supplies and drinking water wells
- reduce stream flow
- increase sediment and nutrient runoff into streams and lakes
- reduce critical habitat for fish, waterfowl, and other wildlife including rare species.

**Q37. What are other impacts of the proposed change?**

A37. Although the regulatory program is the focal point of Michigan's Wetlands Program, activities carried out by DEQ staff address numerous related concerns. Most wetland activities other than regulation are funded by federal agency grants that cannot be used for regulatory purposes. Grant funded projects have responded to the public's demand for improved information regarding the location of wetlands, wetland functions and values, and similar issues. Updated NWI Maps are in preparation through a DEQ partnership with Ducks Unlimited and various federal funding agencies.

Scientific methods have been developed by the DEQ in cooperation with Michigan's universities to more objectively evaluate the condition of wetlands during regulatory review or for other purposes. DEQ wetland managers are also cooperating in the development of a national assessment of the condition of the nation's wetlands. Staff is working with local watershed planning agencies to help evaluate how wetlands protect water supplies, and where wetland restoration can be most useful. Wetland scientists in the DEQ have played a major role developing methods for control of phragmites by property owners along the Great Lakes coast. Landowner guidebooks and various other educational materials have been developed in cooperation with numerous partnering agencies. Staff routinely maintains wetland information on Web pages, and provides educational information at events such as the DEQ Earth Day celebration.

The current budget proposal would eliminate DEQ wetland scientists that are responsible for mapping, development of wetland evaluation methods, development of GIS methods, functional assessment methods, education and outreach, and other projects listed above. Although these projects are primarily federally funded, necessary state matching funds, and staff needed to manage the projects, would be cut. In other words, there would be no comprehensive wetland protection and management program in Michigan.

**Other Questions regarding Wetland Resources**

**Q38: How many acres of wetland are there in Michigan?**

A38: The USFWS wetland inventory program estimates that there are 5,583,000 acres of wetland in Michigan. This is about 15 percent of the land area of the state.

**Q39: How many acres have been lost historically?**

A39: About 50 percent of the wetlands that existed at the time of European settlement have been lost. These losses are not uniform, and are concentrated in southern Michigan counties where wetlands have been drained for both agricultural and urban development.

**Q40: What is the economic value of Michigan's wetlands?**

A40: It is difficult to place a precise dollar value on wetlands, but a number of studies have been done to assess the economic value of the public benefits provided by wetlands. In 2006, Ducks Unlimited sponsored an economic study of the recreational value of Saginaw Bay coastal wetlands, which set the present worth of Saginaw Bay coastal marshes for passive recreational use alone at \$239 million. A 2007 study by the State of New Jersey found that its freshwater wetlands provided \$9.4 billion per year in ecosystem services such as buffering of floods, water filtration, and maintenance of water supply.

**General Sources of Information**

Michigan DEQ Wetlands

[www.michigan.gov/deqwetlands](http://www.michigan.gov/deqwetlands)

U.S. Army Corp of Engineers' Detroit District - Section 404 Regulatory Program

<http://www.lre.usace.army.mil/who/regulatoryoffice/>

U.S. Environmental Protection Agency – multiple wetland program issues

<http://www.epa.gov/owow/wetlands/>

U.S. Fish and Wildlife Service (wetland mapping, status and trends)

<http://www.fws.gov/wetlands/>

Society of Wetland Scientists

[www.sws.org](http://www.sws.org)

Association of State Wetland Managers

[www.aswm.org](http://www.aswm.org)

Environmental Law Institute

[www.eli.org](http://www.eli.org)

Prepared by:

Land and Water Management Division

Department of Environmental Quality

Elizabeth M. Browne, Chief

517-241-9061

[brownee@michigan.gov](mailto:brownee@michigan.gov)

**Department of  
Environmental Quality**  
Wetland Permit Applications

Attachment 1



<b>Statutory Timeframe</b>	30 days (May be paused if additional information is needed)	90 days (120 days if there is a public hearing)
<b>Average Processing Time</b>	30 days by statute	9 days for complete non-public notice applications 46 days for complete public notice applications

**U.S. Army Corps  
of Engineers**  
Permit Applications



<b>Statutory Timeframe</b>	None	None
<b>Average Processing Time</b>	No information	70% of complete non-public notice applications in 60 days 58% of complete public notice applications in 120 days (This does not include Jurisdictional Determinations which average 90 days)

## BRIEFING PAPER

### Scope of Federal Jurisdiction under Section 404 of the Clean Water Act

#### Issue or Request

The proposed repeal of Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, and relinquishment of the federal Section 404 authority to the United States Army Corps of Engineers (USACE) has resulted in questions regarding the scope of federal jurisdiction under Section 404. This paper will summarize the current status of federal Section 404 jurisdiction in general, and how this might apply in Michigan.

#### Background: Jurisdiction under Section 404 of the Clean Water Act

Section 404 of the Clean Water Act regulates placement of dredged or fill material in "Waters of the United States" including wetlands. The term, "Waters of the United States" is defined in federal regulations at 40 CFR §232.2. The scope of these federal regulations has been the subject of two highly publicized decisions in the United States Supreme Court.

- In 2001, in the *Solid Waste Agency of Northern Cook County v Corps (SWANCC)*, the Court ruled that isolated intrastate waters may not be regulated based solely on the presence of migratory birds. Some additional measure of interstate commerce must be used to justify regulation by the federal agencies.

Since the *SWANCC* ruling, federal jurisdiction over isolated waters and wetlands has depended upon a case-by-case finding of a connection to interstate commerce. Isolated wetlands and waters are those that are not connected to interstate navigable waters.

In January of 2003, the United States Environmental Protection Agency (USEPA) proposed rulemaking, following the *SWANCC* decision, that would have removed federal protection from extensive portions of waters of the United States as previously defined in federal regulations. The MDEQ submitted formal comments in response to the proposed rulemaking on April 16 2003, explaining the extent to which protection of isolated wetlands would be compromised. No formal rulemaking followed, but the federal agencies have continued to operate under interim guidance limiting jurisdiction over isolated wetlands and other waters.

- In 2005, in *Rapanos v. United States* and *Carabell v. United States (Rapanos)*, the United States Supreme Court failed to achieve a majority ruling regarding the scope of federal jurisdiction over wetlands adjacent to tributaries to navigable waters. In a fractured decision, four justices defined a set of legal tests regarding the scope of federal jurisdiction; a group of four justices dissented and defined different standards; and the ninth justice established yet a third standard, a portion of which has been referred to as the "significant nexus" test. A plurality was formed in remanding the *Rapanos* and *Carabell* cases for further consideration.

The response to *Rapanos* by the federal courts has been mixed; subsequent federal appellate court rulings have not clarified the situation. A December 9, 2008, Sixth Circuit decision *United States of America v Cundiff* includes the following statement regarding *Rapanos*:

*In its short life, Rapanos has indeed satisfied any "bafflement" requirements. The first court to decide what opinion was controlling decided to ignore all of them and instead opted for earlier circuit court precedent which it felt was clearer and more readily applied. [citation omitted] The Courts of Appeal have not fared much better.*



In *Cundiff*, the Sixth Circuit ultimately determined that the wetlands in question were under federal jurisdiction applying multiple legal tests.

The USEPA and the USACE issued a field guidance memo and an 85 page field *Instructional Guidebook* in June of 2007 to direct federal permit staff in making jurisdictional determinations following the *Rapanos* decision<sup>1</sup>. This guidance summarizes the federal jurisdiction over non-isolated waters as follows.

*The agencies will assert jurisdiction over the following waters:*

- *Traditional navigable waters*
- *Wetlands adjacent to traditional navigable waters*
- *Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries flow year-round or have continuous flow at least seasonally (e.g. typically three months)*
- *Wetlands that directly abut such tributaries*

*The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:*

- *Non-navigable tributaries that are not relatively permanent*
- *Wetlands adjacent to non-navigable tributaries that are not relatively permanent*
- *Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary*

*The agencies will apply the significant nexus standard as follows:*

- *A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all the wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters*
- *The significant nexus includes consideration of hydrologic and ecologic factors*

This decision-making process must be applied to each wetland site associated with a permit application (e.g. with each wetland crossing associated with a highway project). Application of this federal guidance has resulted in major, multi-month regulatory backlogs in states where it has been applied. As a result, the federal agencies recently issued guidance essentially allowing the permit applicant to waive their right to a jurisdictional determination, and to assume that federal jurisdiction exists in order to minimize delays.

Governor Jennifer M. Granholm has previously urged Michigan's Congressional Delegation to support amendment of the Clean Water Act to clarify the scope of federal jurisdiction (letters of September 26, 2003 and December 12, 2007). Her letters express concern that federal jurisdiction in other Great Lakes states will not be sufficient to protect interstate resources.

#### Scope of Federal Jurisdiction in Michigan

*In light of the U.S. Supreme Court Decisions, and the current federal process for case-by-case determination of federal jurisdiction, it is impossible to evaluate the scope of Section 404 jurisdiction on a statewide basis.* The USEPA has determined that Michigan's wetland law is

---

<sup>1</sup> Copies of federal guidance memos, additional explanatory documents, and the *Instructional Guidebook* are available at [www.epa.gov/owow/wetlands/guidance/CWAwaters.html](http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html).

consistent with federal law in that the state maintains jurisdiction over any wetland where the federal government is likely to assert jurisdiction on a case-by-case basis.

If the Section 404 Program is returned to the USACE, it is expected that – at a minimum – the USACE may require a detailed case-by-case determination of jurisdiction in the following geographic areas, and would assert jurisdiction only based on specific legal findings in accordance with the *SWANCC* and *Rapanos* cases.

**Isolated wetlands.** The MDEQ has estimated that 930,856 acres, or 17 percent of the wetlands in Michigan, are not physically connected to lakes or streams<sup>2</sup>. Federal jurisdiction over these wetlands would rely on an assertion of a connection to interstate commerce. Isolated wetlands include both relatively common habitat types and rare ecosystems types such as fens, bogs, and lakeplain prairies. The MDEQ provided information on species that would be impacted by loss of isolated wetlands, including reptiles and amphibians, in its previous comment regarding the *SWANCC* rulemaking.

**Wetlands adjacent to non-navigable tributaries that are not relatively permanent.**

According to an evaluation of the National Hydrography Dataset, 36 percent of the streams in Michigan are intermittent or ephemeral. Federal jurisdiction over wetlands that are adjacent to these streams would rely on a finding that the stream in question has a “significant nexus” with the downstream traditionally navigable waters. No analysis has been completed to determine what percentage of the State’s wetlands are adjacent to intermittent or ephemeral streams that do or do not have such a significant nexus.

**Wetlands that are adjacent to, but do not directly abut, permanent non-navigable tributaries.** An unknown percentage of the wetlands that are adjacent to Michigan’s perennial streams may not meet this legal test, which will be based on a case-by-case analysis of the hydrologic connectivity between the wetland and the stream.

**Wetlands adjacent to other isolated waters.** There are 26,384 inland lakes and ponds in Michigan with no outlet<sup>3</sup>. Inland lakes or ponds that do not have an outlet connecting the lake to a navigable water would not be considered to be under federal Section 404 jurisdiction unless an interstate commerce connection is established. Examples of factors that have been used to establish interstate commerce include the use of the lake by individuals from another state, commercial boat rentals, and trapping of furbearing mammals; such decisions must be made by the federal agencies. If such an interstate commerce connection is not established, then wetlands adjacent to the lake would not be regulated.

Analysis

Given the current uncertainty associated with federal law, it is impossible to determine the quantitative scope of jurisdiction over wetlands in Michigan on a statewide basis. In those states where the federal agencies are the lead regulatory agencies, jurisdictional decisions are largely made on a case-by-case basis resulting in a significant degree of delay and uncertainty for permit applicants.

---

<sup>2</sup> See MDEQ comments to USEPA, dated April 16, 2003, in response to USEPA Advanced Notice of Proposed Rulemaking and Governor Granholm’s letter of September 23, 2003.

<sup>3</sup> *Michigan Lakes and Pond*, C.R. Humphrys et al, 1965 as cited in MDEQ comments of April 16, 2003

In Michigan, it is anticipated that case-by-case jurisdictional determinations for the following categories of wetlands would delay permit processing. It is likely that the USACE would not protect all of these wetlands under the Clean Water Act.

- **Isolated wetlands not physically connected to lakes or streams.**  
This category includes 930,856 acres, or 17 percent of Michigan's wetlands.
- **Wetlands adjacent to streams that are not relatively permanent.**  
36 percent of Michigan's streams are intermittent or ephemeral. No estimate exists of the acreage of wetlands that would be impacted.
- **Wetlands that are adjacent to, but not directly abutting, relatively permanent streams.** The USACE must determine whether wetlands are "abutting" or "adjacent to" a perennial stream based on an evaluation of site hydrology. No estimate of the acreage of wetlands impacted exists.
- **Wetlands that are adjacent to isolated lakes and ponds.**  
There are 26,384 isolated lakes and ponds in Michigan; wetlands adjacent to these ponds would be regulated only if an interstate connection were defined for the lake or pond.

Prepared by: Land and Water Management Division  
Michigan Department of Environmental Quality  
February 24, 2009